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PP v. SS DOLPHINE MARINE (M) SDN BHD & ORS

COURT OF APPEAL, PUTRAJAYA
MOHTARUDIN BAKI JCA
TENGKU MAIMUN TUAN MAT JCA
ZAKARIA SAM JCA
B [CRIMINAL APPEAL NO: W-09-336-11-2014]
4 SEPTEMBER 2015

CUSTOMS AND EXCISE: *Removal from customs control – Seizure – Goods were moved from licensed warehouse to Free Zone with permission by customs officer – Allegation that goods sold to company that did not exist – Whether goods illegally removed from customs control – Whether goods were exported – Forfeiture of bank guarantee under ss. 56 and 61 of Anti-Money Laundering and Terrorism Financing Act 2001 – Whether application for forfeiture made within time stipulated by statutory provisions – Whether movement of goods in breach of law – Customs Act 1967, s. 135(1)(c)*

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The second, third and fourth respondents were shareholders of the first respondent, a company which was in the business of trading beer. The licensed warehouse was under the customs control which meant that the movement of the goods into and from the warehouse could only be done with the permission of the customs *via* the Customs Declaration Form No. 8, accompanied by a bank guarantee provided by the purchaser or exporter of the goods. Mercy Trading Resources ('MTR') had purchased goods from the first respondent. MTR provided a bank guarantee to the customs to move the goods from the first respondent's licensed warehouse to the Free Zone, Port Klang and this was approved by the customs. Investigation by the customs revealed that the first respondent had sold the goods to a company that did not exist and the goods were not exported since the bill of lading issued was fraudulent. The first respondent was charged for illegally removing goods from any customs control, an offence under s. 135(1) of the Customs Act 1967 ('the Act'). The appellant filed an application to the High Court, pursuant to ss. 56 and 61 of the Anti-Money Laundering and Terrorism Financing Act 2001 ('AMLATFA') to forfeit RM218,413.56 ('the property') held in the first respondent's bank account. In dismissing the application, the High Court held that the application was filed out of time; and that the movement of the goods was not in breach of the law. Hence, the present appeal. The appellant submitted that (i) the property was seized on 14 November 2011 and the application to the High Court was filed on 8 November 2012, which was well-within the 12 months period stipulated under s. 56(1) of the AMLATFA; and (ii) there was no evidence that the duties had been paid to the customs.

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Held (dismissing appeal; affirming order of High Court)
Per Tengku Maimun Tuan Mat JCA delivering the judgment of the court:

(1) Section 44 of the AMLATFA provides that where an enforcement agency, having the power to enforce the law under which a serious offence is committed, has reasonable grounds to suspect that an offence under sub-s. 4(1) of the AMLATFA has been, is being or is about to be committed, the enforcement agency may issue an order for the freezing of any property of that person. Sub-section 50(1), on the other hand empowers the Public Prosecutor to order the seizure of specifically, movable property in financial institution. (para 20)

(2) In the brief grounds in support of the application filed by the appellant, it was stated that the property was seized on 16 August 2011. The High Court Judge might have relied on this averment to find that the seizure was made on 16 November 2011. However, from the appeal recorded, 16 November 2011 was in fact the freezing order under s. 44 of the AMLATFA while order for seizure under sub-s. 50(1) of the same was dated 14 November 2011. As such, the averment made by the appellant in the brief grounds in support of the notice of motion in respect of the date of seizure was factually incorrect. The High Court Judge had erred on the facts when His Lordship found that the property was seized on 16 August as the property was in fact seized by the appellant on 14 November 2011. The application filed by the appellant on 8 November was thus before the expiration of 12 months from the date of seizure as required under sub-s. 56(1) of the AMLATFA. (para 21)

(3) No offence had been disclosed under s. 135(1)(c) of the Act. To establish an offence under s. 135(1)(c) of the Act, the appellant must prove that the goods stored in the first respondent's licensed warehouse were illegally removed from the customs control without the permission of customs. Should there be any irregularities in the movement of the goods from the bonded warehouse to the Free Zone, Port Klang, the customs had the right to forfeit the bank guarantee provided by MTR, being the security for the customs duties payable on the goods. The customs failed to take such action. Based on documentary evidence, it could not be denied that the proper officers of the customs had duly approved and permitted the removal of goods from the first respondent's licensed bonded warehouse which was deemed to be under customs' control. As such, it could not be said that the first respondent had illegally removed the goods from customs' control. The question of the property having been obtained from unlawful activity did not arise. (paras 28, 29 & 30)

Bahasa Malaysia *Translation Of Headnotes*

Responden kedua, ketiga dan keempat merupakan pemegang syer responden pertama, sebuah syarikat yang menjalankan perniagaan perdagangan bir. Gudang berlesen berada bawah kawalan kastam yang mana bermaksud bahawa perpindahan keluar-masuk barang-barang hanya boleh dilakukan dengan kebenaran kastam melalui Borang Deklarasi Kastam No. 8, disertai dengan jaminan bank yang dikemukakan oleh pembeli atau pengeksport barang-barang tersebut. Mercy Trading Resources ('MTR') telah membeli barang-barang daripada responden pertama. MTR mengemukakan jaminan bank kepada kastam untuk memindahkan barang-barang tersebut dari gudang berlesen responden pertama ke Zon Bebas, Pelabuhan Klang dan ini dibenarkan oleh kastam. Siasatan oleh kastam mendedahkan bahawa responden pertama telah menjual barang-barang tersebut kepada sebuah syarikat yang tidak wujud dan barang-barang tersebut tidak dieksport kerana bil muatan adalah palsu. Responden pertama dipertuduh memindahkan barang-barang tersebut daripada kawalan kastam secara tidak sah, satu kesalahan di bawah s. 135(1) Akta Kastam 1967 ('Akta'). Perayu memfailkan permohonan kepada Mahkamah Tinggi, di bawah ss. 56 dan 61 Akta Pencegahan Pengubahan Wang Haram Dan Pembiayaan Keganasan 2001 ('AMLATFA') untuk menyita RM218,413.56 ('harta tersebut') yang berada dalam akaun bank responden pertama. Dalam menolak permohonan, Mahkamah Tinggi memutuskan bahawa permohonan yang difailkan melebihi had masa; dan bahawa perpindahan barang-barang tersebut tidak melanggar undang-undang. Oleh itu, rayuan ini. Perayu menghujahkan bahawa (i) harta tersebut dirampas pada 14 November 2011 dan permohonan kepada Mahkamah Tinggi difailkan pada 8 November 2012, dalam tempoh 12 bulan yang diperuntukkan di bawah s. 56(1) AMLATFA; dan (ii) tiada keterangan yang menunjukkan duti telah dibayar kepada kastam.

Diputuskan (menolak rayuan; mengesahkan perintah Mahkamah Tinggi) Oleh Tengku Maimun Tuan Mat HMR menyampaikan penghakiman mahkamah:

(1) Seksyen 44 AMLATFA memperuntukkan bahawa apabila sebuah agensi penguatkuasaan, yang mempunyai kuasa untuk melaksanakan undang-undang dalam mana satu kesalahan serius telah dilakukan, mempunyai sebab untuk mengesyaki bahawa satu kesalahan di bawah sub-s. 4(1) AMLATFA telah, sedang atau akan dilakukan, agensi pelaksanaan tersebut boleh mengeluarkan satu perintah untuk membekukan apa-apa harta orang tersebut. Sub-seksyen 50(1) pula memberi kuasa kepada Pendakwa Raya untuk memerintahkan rampasan, khasnya, harta alih dalam institusi kewangan.

(2) Dalam alasan ringkas bagi menyokong permohonan yang difailkan oleh perayu, dinyatakan bahawa harta tersebut disita pada 16 Ogos 2011. Hakim Mahkamah Tinggi mungkin telah bergantung kepada hujahan ini

untuk memutuskan bahawa penyitaan dibuat pada 16 November 2011. Walau bagaimanapun, berdasarkan rayuan yang direkodkan, 16 November 2011 adalah tarikh perintah pembekuan di bawah s. 44 AMLATFA manakala perintah penyitaan di bawah sub-s. 50(1) Akta yang sama bertarikh 14 November 2011. Dengan itu, hujahan yang dibuat oleh perayu dalam alasan ringkas bagi menyokong notis usul berkenaan tarikh penyitaan tidak tepat secara fakta. Mahkamah Tinggi terkhilaf secara fakta apabila beliau memutuskan bahawa harta telah disita pada 16 Ogos kerana harta tersebut sebenarnya disita oleh perayu pada 14 November 2011. Permohonan yang difailkan oleh perayu pada 8 November adalah sebelum tarikh luput 12 bulan dari tarikh penyitaan seperti yang dikehendaki di bawah sub-s. 56(1) AMLATFA.

(3) Tiada kesalahan yang didedahkan di bawah s. 135(1)(c) Akta. Untuk membuktikan pertuduhan di bawah s. 135(1)(c) Akta, perayu mesti membuktikan bahawa barang-barang yang disimpan dalam gudang berlesen responden pertama telah dipindahkan secara salah daripada kawalan kastam tanpa kebenaran kastam. Sekiranya terdapat salah aturan dalam perpindahan barang-barang daripada gudang berlesen tersebut ke Zon Bebas, Pelabuhan Klang, kastam mempunyai hak untuk menyita jaminan bank yang dikemukakan oleh MTR sebagai jaminan bagi duti kastam yang perlu dibayar bagi barang-barang tersebut. Kastam gagal mengambil tindakan sedemikian. Berdasarkan keterangan dokumentar, tidak dinafikan bahawa pegawai-pegawai kastam yang sah telah membenarkan dan meluluskan perpindahan barang-barang tersebut dari gudang berlesen responden pertama yang dikatakan berada di bawah kawalan kastam. Dengan itu, tidak boleh dikatakan bahawa responden pertama telah memindahkan barang-barang tersebut daripada kawalan kastam secara salah. Persoalan harta tersebut telah diperolehi daripada aktiviti haram tidak timbul.

Legislation referred to:

Anti-Money Laundering and Anti-Terrorism Financing Act 2001, ss. 3(1), 4(1)(a), 44, 50(1), 56(1), (2)(a), 61
Customs Act 1967, ss. 2(2), 65, 135(1)(c)
Federal Constitution, art. 13

For the appellant - Allan Suman Pillai; DPP
For the respondents - JR Ravendren; M/s JR Ravendren & Assocs

[Appeal from High Court, Kuala Lumpur; No: Criminal Application No: 44-184-11-2012]

Reported by Najib Tamby

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JUDGMENT

Tengku Maimun Tuan Mat JCA:

[1] This is an appeal by the public prosecutor (the appellant) against the decision of the High Court at Kuala Lumpur in dismissing the appellant's
B application *vide* a notice of motion for the following prayers:

> 1) Untuk disiarkan satu notis dalam Warta di bawah Subseksyen 61(2) Akta Pencegahan Pengubahan Wang Haram dan Pencegahan Pembiayaan Keganasan 2001 bagi memanggil mana-mana pihak ketiga yang menuntut mempunyai apa-apa kepentingan mengenai
C harta-harta alih di atas supaya hadir di hadapan Mahkamah pada tarikh yang dinyatakan dalam notis untuk menunjukkan sebab mengapa harta-harta alih yang telah disita tidak boleh dilucuthakkan dan seterusnya memohon Mahkamah Yang Mulia ini melucuthakkan;
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> (a) Akaun semasa bernombor 3-1315505-02 milik SS DOLPHINE
D MARINE (M) SDN BHD (No Pendaftaran Perniagaan: 503179-V) di Public Bank Berhad Cawangan PJ Newton dan wang di dalamnya yang berjumlah RM218,413.56 dan apa-apa pertambahan kepadanya yang disita pada 16.08.2011 kepada Kerajaan Malaysia;
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> 2) Sebarang perintah lain atau lanjut yang difikirkan adil, patut dan
E sesuai oleh Mahkamah Yang Mulia ini.

[2] We had unanimously dismissed the appeal. We now give our reasons for the said decision.

Background Facts

F **[3]** The brief grounds for the application filed by the appellant in the High Court are stated thus:

> Bahawa Pendakwa Raya di bawah kuasa-kuasa yang diberi oleh subseksyen 56(1) Akta Pencegahan Penggubahan Wang Haram dan Pencegahan Pembiayaan Keganasan 2001 (Akta 613) dibaca bersama
G seksyen 376 Kanun Tatacara Jenayah (Akta 593) telah berpuas hati bahawa harta-harta alih yang disita oleh pegawai penyiasat Jabatan Kastam DiRaja Malaysia pada 16.08.2011 sebagaimana tersebut di atas adalah berkaitan dengan suatu kesalahan di bawah subseksyen 4(1)(a) Akta Pencegahan Penggubahan Wang Haram dan Pencegahan Pembiayaan Keganasan 2001.

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[4] The affidavits filed by the appellant and the respondents in respect of the application, established the following facts.

[5] The first respondent is in the business of trading in beer (the goods). The second, third and the fourth respondents are the shareholders of the first
I respondent company. The first respondent had obtained a licence from the customs to operate a public bonded warehouse established under s. 65 of the Customs Act 1967 (the Customs Act). At all material time, the licensed

warehouse is under the customs control which means that the movement of the goods into and from the warehouse could only be done with the permission of the customs *via* the Customs Declaration Form No. 8 accompanied by a bank guarantee provided by the purchaser or exporter of the goods. The bank guarantee is the security to safeguard the customs duties payable on the goods.

[6] Between the months of January 2008 until February 2010, Mercy Trading Resources had purchased the goods from the first respondent. On the directive of the customs, Mercy Trading Resources had provided a bank guarantee to the customs for the movement of the goods from the first respondent's licensed warehouse in Kuantan to the Free Zone, Port Klang. By the Customs Form No. 8 or K8, the customs had approved the movement of the goods by Mercy Trading Resources to the Free Zone, Port Klang.

[7] To appreciate the case for the appellant, we reproduce the affidavit in support affirmed by Idris bin Abdul Wahab, the investigating officer of the customs (appeal record 1: pp. 30-55), wherein he had stated as follows:

> 4. Saya menegaskan bahawa pada 16.8.2011 saya telah membuka satu Kertas Siasatan terhadap Responden Pertama di bawah Seksyen 135(1)(c) Akta Kastam 1967 (selepas ini dirujuk sebagai 'AK 1967').
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> 5. ...
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> 6. ...
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> 7. ... syarikat ini telah membuat pemindahan bir untuk tujuan ekspot melalui pengikraran barang dalam Borang Kastam No. 8 kepada syarikat yang tidak wujud. Pembuktian ini telah diperolehi melalui dokumen Invois jualan syarikat dan Bill of Lading. Adalah dipercayai syarikat sengaja membuat pemindahan kepada syarikat yang tidak wujud ini bagi menunjukkan bahawa bir ini telah diekspot tetapi sebenarnya diseludup masuk semula ke Kawasan Utama Kastam (KUK).
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> 8. ... saya telah menjumpai 46 set Borang Kastam No. 8 yang didapati membuat pemindahan kepada syarikat yang tidak wujud. Borang-borang Kastam No. 8 tersebut adalah berkaitan pemindahan bir ke Zon Bebas Pelabuhan Klang (Northport Distripark Sdn Bhd dan KPM CFS Northport Container Terminal 2).
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> 9. ... pemindahan ini dibuat kepada syarikat yang tidak benar. Bir-bir ini tidak diekspot tetapi dipindahkan ke (KUK) tanpa sebarang kelulusan berdasarkan daripada maklumat-maklumat yang diperolehi daripada dokumen Borang Kastam No. 8, Invois Jualan dan Bill of Lading. Responden Pertama dengan sengaja tidak meletakkan ke gudang manakah bir-bir akan dimasukkan dengan tujuan untuk mengelirukan pihak jabatan.

[8] At para. 53, the deponent averred that:

> ... Syarikat Mercy Trading Resources merupakan syarikat berstatus pemilikan tunggal di miliki oleh Nagapan a/l Manickam. Syarikat menggunakan alamat kediaman beliau sebagai alamat perniagaan. Beliau membuat penafian tentang penubuhan syarikat ini dan juga transaksi-transaksi pembelian bir tersebut. Beliau membuat satu laporan polis berkaitan kes ini. ....

[9] *Vide* paras. 58-62 of the affidavit, it was averred that various sums were credited into the first respondent's Public Bank Account No. 3-1315505-02. And it was further averred that:

> 63. Saya menegaskan bahawa hasil siasatan saya mendapati kesemua pemindahan tersebut di bayar oleh Syarikat Transglobel Aiim (M) Sdn Bhd bukannya oleh Syarikat Mercy Trading Resources ataupun syarikat lain di Singapura.
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> 64. Saya menegaskan bahawa hasil siasatan saya mendapati syarikat Transglobel Aiim (M) Sdn Bhd tidak wujud dan menggunakan alamat palsu di kawasan utama kastam ...
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> 65. ...
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> 66. Saya menegaskan hasil siasatan adalah dipercayai kesemua pembayaran kepada Responden Pertama yang datang dari Syarikat Transglobal Aiim (M) Sdn Bhd di KUK adalah bagi pembayaran pembelian bir dari yang sepatutnya diekspot ke luar Negara.
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> 67. ... hasil siasatan yang dijalankan mendapati Responden Pertama, telah menjual bir kepada syarikat yang tidak wujud, bir yang dipindahkan tidak memasuki kawasan zon bebas sebagaimana yang diikrar malah syarikat penerima adalah syarikat yang juga tidak wujud dan bir tersebut di buktikan tidak di ekspot apabila Bill of Lading yang dikemukakan palsu. Oleh yang demikian Respondent Pertama telah melakukan kesalahan di bawah Seksyen 135(1)(c) Akta Kastam 1967 iaitu Dengan berpengetahuan memindahkan barangan dari kawalan kastam tanpa kebenaran.

[10] The appellant nevertheless did not prefer any charges against the first respondent under s. 4(1)(a) of Anti-Money Laundering and Anti-Terrorism Financing Act 2001 (AMLATFA). For completeness, we set out the nexus between sub-s. 135(1)(c) of the Customs Act and s. 4(1)(a) of AMLATFA.

[11] Section 4(1)(a) of AMLATFA provides that any person who engages in or attempts to engage in money laundering commits an offence. Money laundering is defined in s. 3(1) of AMLATFA as the act of a person who engages, directly or indirectly, in a transaction that involves proceeds of any unlawful activity. Unlawful activity is any activity which is related, directly or indirectly, to any serious offence or any foreign serious offence. Serious offence has also been given the definition in AMLATFA. It means any of the

offences specified in the Second Schedule of AMLATFA. And s. 135 of the Customs Act concerning smuggling offences is specified in the Second Schedule of AMLATFA.

[12] On 16 August 2011 an order under s. 44 was issued against the first respondent, followed by an order dated 14 November 2011 under sub-s. 50(1) of AMLATFA and the application by the appellant to the High Court on 8 November 2012.

Proceedings In The High Court

[13] The application in the High Court to forfeit the property namely RM218,413.56 and any accretion to it, held in the first respondent's bank account, was brought by the appellant pursuant to ss. 56 and 61 of the AMLATFA which read respectively:

56. Forfeiture of property where there is no prosecution

(1) Subject to section 61, where in respect of any property frozen or seized under this Act there is no prosecution or conviction for an offence under subsection 4(1) or a terrorism financing offence, the Public Prosecutor may, before the expiration of twelve months from the date of the freeze or seizure, apply to a judge of the High Court for an order of forfeiture of that property if he is satisfied that such property had been obtained as a result of or in connection with an offence under subsection 4(1) or a terrorism financing offence, as the case may be, or is terrorist property.

(2) The judge to whom an application is made under subsection (1) shall make an order for the forfeiture of the property if he is satisfied:

(a) that the property is the subject-matter of or was used in the commission of an offence under subsection 4(1) or a terrorism financing offence or is terrorist property; and

(b) that there is no purchaser in good faith for valuable consideration in respect of the property.

(3) Any property that has been seized and in respect of which no application is made under subsection (1) shall, at the expiration of twelve months from the date of its seizure, be released to the person from whom it was seized.

(4) In determining whether or not the property has been obtained as a result of or in connection with an offence under subsection 4(1) or a terrorism financing offence or is terrorist property, the court shall apply the standard of proof required in civil proceedings.

61. *Bona fide* third parties

(1) The provisions in this Part shall apply without prejudice to the rights of *bona fide* third parties.

A (2) The court making the order of forfeiture under section 55 or the judge to whom an application is made under subsection 56(1) shall cause to be published a notice in the *Gazette* calling upon any third party who claims to have any interest in the property to attend before the court on the date specified in the notice to show cause as to why the property shall not be forfeited.

B (3) A third party's lack of good faith may be inferred, by the court or an enforcement agency, from the objective circumstances of the case.

(4) The court or enforcement agency shall return the property to the claimant when it is satisfied that:

C (a) the claimant has a legitimate interest in the property;

(b) no participation, collusion or involvement with respect to the offence under subsection 4(1) or a terrorism financing offence which is the object of the proceedings can be imputed to the claimant;

D (c) the claimant lacked knowledge and was not intentionally ignorant of the illegal use of the property, or if he had knowledge, did not freely consent to its illegal use;

(d) the claimant did not acquire any right in the property from a person proceeded against under circumstances that give rise to a reasonable inference that any right was transferred for the purpose of avoiding the eventual subsequent forfeiture of the property; and

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(e) the claimant did all that could reasonably be expected to prevent the illegal use of the property.

F **[14]** The issues that arose for determination by the High Court were:

(i) whether there was delay on the part of the appellant in filing the application for forfeiture of the property;

G (ii) whether the property was unlawfully or illegally acquired by the first respondent; and

(iii) whether the property was forfeited in violation of art. 13 of the Federal Constitution.

H **[15]** For convenience, we reproduce the findings of the learned High Court Judge on the above issues as follows:

Mengenai isu 1, Mahkamah dapati permohonan Notis Usul Kandungan 2 dibuat diluar tempoh 12 bulan selepas ia disita. Barang-barang terbabit disita pada 16/8/2011. Notis Usul Kandungan 2 ini difailkan pada 08/11/2012 hampir 3 bulan diluar tempoh yang ditetapkan oleh Seksyen 56(3) AMLATFA. Keputusan kes *PP v. Dragcom Sdn Bhd & Ors* [2013] 5 MLJ 594 diikuti.

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Mengenai isu kedua, tiada bukti Responden 1 melakukan kesalahan di bawah seksyen 135(1)(c) Akta Kastam iaitu 3 intipati/elemen perlu dibuktikan:

1. Responden 1 terlibat dalam pemindahan bir-bir itu secara tidak sah.
2. Barang-barang itu dipindah dari kawalan Kastam tanpa kebenaran.
3. Pemindahan itu dilakukan secara menyalahi undang-undang.

Mahkamah berpendapat 3 intipati/elemen itu tak dibuktikan kerana pemindahan-pemindahan itu dilakukan oleh Syarikat Mercy Trading Resources dengan kebenaran pihak Kastam seperti dalam Borang Kastam No. 8 yang diluluskan oleh pihak Kastam sendiri (Dr. Andrew Chew Peng Hui – *Customs Offence*, 4th Edition, Sweet & Maxwell Asia mukasurat 110111. "goods kept in a licensed warehouse are deemed to be under customs control and can only be removed with the permission of a proper officer of customs".

Pemindahan bir-bir tersebut dibuat oleh Syarikat Mercy Trading Resources dan mereka membayar wang jaminan bank kepada Kastam untuk mempastikan sebarang cukai yang akan dikenakan dibayar. Bayaran telah dibuat sama ada oleh Syarikat Mercy Trading atau Syarikat Trans globel (M) Sdn Bhd.

Meneliti keterangan afidavit keseluruhannya Mahkamah dapati wang-wang yang diperoleh Responden 1 adalah bukan diperoleh secara haram. Jika Kastam tidak berpuas hati dengan cara pemindahan bir-bir itu dari gudang berlesen Responden 1 di Kuantan ke KUK, pihak Kastam boleh merampas wang jaminan bank Mercy Trading. Pemindahan ini dilakukan secara sah. (*PP v. Ong Seng Huat* MTAS Rayuan Jenayah 41-58-08). Apatah lagi barang-barang itu belum dikeluarkan dari KUK yang dikatakan oleh Pemohon untuk diseludup semula (Seksyen 2 dan Seksyen 35 Akta Kastam). Ia suatu syak yang tidak dibuktikan oleh Pemohon. Kes *Syed Abdullah v. PP* [1964] 30 MLJ 48 memutuskan "mere suspicion is not evidence.

Mengenai isu ketiga, Mahkamah berpendapat, penyitaan dan pembekuan harta tersebut tidak sah kerana harta-harta itu diperolehi oleh Responden-Responden secara sah. Maka ia berlawanan dengan Perkara 13 Perlembagaan Persekutuan.

[16] As a result, the application was dismissed by the High Court, hence the appeal before us.

The Appeal

[17] Learned DPP canvassed the following issues in the appeal:

(i) whether the application for forfeiture to the High Court was out of time; and

(ii) whether the movement of the goods was in breach of the law.

[18] It was the submission of learned DPP that the learned High Court Judge had seriously misdirected himself in finding that the application for the forfeiture of the property by the appellant was out of time. Learned DPP submitted that the date of 16 August 2011 was in relation to the freezing order and not the seizure. The property, submitted learned DPP was seized on 14 November 2011. Under sub-s. 56(1) of AMLATFA, the appellant may, before the expiration of 12 months from the date of the freeze or seizure, apply to a judge of the High Court for an order of forfeiture. The appellant filed the application in the High Court on 8 November 2012. Learned DPP thus submitted that the application was well within the 12 months period stipulated under sub-s. 56(1) of the AMLATFA.

[19] On the second issue, learned DPP submitted that the investigation by the customs revealed that the goods were not sold to Mercy Trading Resources and exported to Singapore as disclosed in the bill of lading and that all payments for the sale by the first respondent were made by a different company known as Syarikat Transglobel Aiim (M) Sdn Bhd, operating in the KUK. In this regard, learned DPP further submitted that there was no evidence that the duties had been paid to the customs.

Our Findings

[20] In respect of the first issue, s. 44 of AMLATFA provides that where an enforcement agency, having the power to enforce the law under which a serious offence is committed, has reasonable grounds to suspect that an offence under sub-s. 4(1) of AMLATFA has been, is being or is about to be committed, the enforcement agency may issue an order for the freezing of any property of that person. Subsection 50(1) on the other hand empowers the public prosecutor to order the seizure of specifically, movable property in financial institution.

[21] As set out in para. 3 of this judgment, in the brief grounds in support of the application filed by the appellant, the appellant had stated that the property was seized (disita) on 16 August 2011 (see p. 24: appeal record vol. 1). The learned High Court Judge may have relied on this averment made in support of the application, to find that the seizure was made on 16 August 2011. However, we noted from the appeal record that what was dated 16 August 2011 was in fact the freezing order under s. 44, whilst the order for seizure under sub-s. 50(1) of AMLATFA was dated 14 November 2011 (see pp. 376-378, 383: appeal record vol. 2). As such, the averment made by the appellant in the brief grounds in support of the notice of motion in respect of the date of seizure was factually incorrect. It follows that the learned High Court Judge had erred on the facts when His Lordship found that the property was seized on 16 August 2011 as the property was in fact seized by the appellant not on 16 August 2011 but on 14 November 2011. The application filed by the appellant on 8 November 2012 was thus before the expiration of 12 months from the date of seizure as required under sub-s. 56(1) of AMLATFA.

[22] On the second issue, pursuant to sub-s. 56(2)(a) of AMLATFA, a judge may make an order of forfeiture of the property frozen and seized, if the judge is satisfied that the property is the subject matter of or was used in the commission of an offence under sub-s. 4(1) of AMLATFA. A

[23] The premise of the appellant's application was that the first respondent had committed an offence under s. 135(1)(c) of the Customs Act and that the property was the proceeds of such offence. B

[24] Section 135 of the Customs Act provides for the various smuggling offences and in particular, sub-s. (1)(c) stipulates that it shall be an offence for whoever who illegally removes or withdraws or in any way assists or is concerned in the illegal removal or withdrawal of any goods from any customs control. C

[25] "Customs control" is defined in sub-s. 2(2) of the Customs Act as follows: D

> For the purpose of this Act, goods shall be deemed to be under customs control whilst they are deposited or held in any licensed or customs warehouse, post office, or in any vessel, train, conveyance, aircraft, pipeline or place from which they may not be removed except with the permission of the proper officer of customs.

[26] From the above, to establish an offence under sub-s. 135(1)(c), it is incumbent upon the appellant to prove that the goods stored in the first respondent's licensed warehouse were illegally removed from the customs control without the permission of customs. E

[27] As adverted to in the earlier part of this judgment, the movement of the goods had been approved *via* the customs forms ie, forms K8. The genuineness of the forms was not disputed. It was evident from forms K8 that every movement of the goods from the licensed bonded warehouse was approved by the proper officer of the customs at the place of departure and place of arrival. Further, the customs had accepted the bank guarantee provided by Mercy Trading Resources. F G

[28] We agreed with learned counsel for the respondents that should there be any irregularities in the movement of the goods from the bonded warehouse to the Free Zone, Port Klang, the customs had the right to forfeit the bank guarantee provided by Mercy Trading Resources, being the security for the customs duties payable on the goods. The customs had failed to take such an action. H

[29] More importantly, based on the documentary evidence (see forms K8 in the appeal record vol. 1 and 2 between pp. 65 until 286), it cannot be denied that the proper officers of the customs had duly approved and permitted the removal of the goods from the first respondent's licensed I

A bonded warehouse which was deemed to be under customs control. As such, it cannot be said that the first respondent had illegally removed the goods from customs control. The question of the property having been obtained from unlawful activity did not arise.

B **Conclusion**

[30] To conclude, we agreed with the learned High Court Judge that no offence had been disclosed under sub-s. 135(1)(c) of the Customs Act. We found that the learned High Court Judge has not erred on the facts or the law in his finding that the appellant had failed to prove that the goods were removed from customs control illegally or without approval. The appeal was consequently dismissed and the order of the High Court was affirmed.

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